

**STATE OF WASHINGTON  
DEPARTMENT OF NATURAL RESOURCES  
DOUG SUTHERLAND, Commissioner of Public Lands**

**AQUATIC LANDS CONSERVATION LEASE**

**TABLE OF CONTENTS**

SECTION	PAGE
1. PROPERTY .....	1
1.1 Property Defined .....	1
1.2 Survey, Maps, and Plans .....	2
1.3 Inspection .....	2
2. USE .....	2
2.1 Permitted Use .....	2
2.2 Restrictions on Use .....	2
2.3 Conformance with Laws .....	3
3. TERM .....	3
3.1 Term Defined .....	3
3.2 Hold Over .....	3
3.3 End of Term .....	3
4. RENT .....	4
4.1 Annual Rent .....	4
4.2 Payment Place .....	4
4.3 Adjustment Based on Use .....	4
4.4 Rent Adjustments for Water-Dependent Uses .....	4
4.5 Rent Adjustment Procedures .....	5
5. OTHER EXPENSES .....	5
6. LATE PAYMENTS AND OTHER CHARGES .....	5
6.1 Late Charge .....	5
6.2 Interest Penalty for Past Due Rent and Other Sums Owed .....	5
6.3 No Counterclaim, Setoff, or Abatement of Rent .....	6
7. IMPROVEMENTS .....	6
7.1 Existing Improvements .....	6
7.2 New Improvements .....	6
7.3 Unauthorized Improvements .....	6
7.4 Removal of Improvements .....	6
8. ENVIRONMENTAL LIABILITY/RISK ALLOCATION .....	6
8.1 Definition .....	6
8.2 Use of Hazardous Substances .....	7
8.3 Current Conditions, Duty of Utmost Care, and Duty to Investigate .....	7
8.4 Notification and Reporting .....	8
8.5 Indemnification .....	9
8.6 Cleanup .....	10
8.7 Sampling by State, Reimbursement, and Split Samples .....	10
8.8 <i>Sediment Investigation</i> .....	11

8.8[9]	Reservation of Rights.....	12
9.	ASSIGNMENT AND SUBLETTING .....	12
10.	INDEMNITY, FINANCIAL SECURITY, INSURANCE .....	12
10.1	Indemnity .....	12
10.2	Financial Security .....	13
10.3	Insurance .....	13
10.4	State's Acquisition of Insurance.....	16
10.5	<i>Self-Insurance</i> .....	16
11.	MAINTENANCE AND REPAIR .....	17
12.	DAMAGE OR DESTRUCTION.....	17
13.	DEFAULT AND REMEDIES.....	17
14.	ENTRY BY STATE .....	18
15.	DISCLAIMER OF QUIET ENJOYMENT .....	18
16.	NOTICE.....	19
17.	TIME IS OF THE ESSENCE.....	19
18.	ENTIRE AGREEMENT.....	19
19.	APPLICABLE LAW AND VENUE.....	19
20.	RECORDATION.....	19
21.	MODIFICATION .....	20

**STATE OF WASHINGTON  
DEPARTMENT OF NATURAL RESOURCES  
DOUG SUTHERLAND, Commissioner of Public Lands**

**AQUATIC LANDS CONSERVATION LEASE**

**AQUATIC LANDS LEASE NO. [\_\_-\_\_\_\_]**

THIS LEASE is made by and between the STATE OF WASHINGTON, acting through the Department of Natural Resources ("State"), and  
[\_\_\_\_], a [*Washington corporation -OR- partnership  
-OR- marital community -OR- single individual -OR- \_\_\_\_\_*] ("Tenant").

**BACKGROUND**

Tenant desires to lease aquatic lands commonly known as [\_\_\_\_], which [*is  
-OR- are*] [*tidelands -AND/OR- shorelands -AND/OR- bedlands -AND/OR- a harbor  
area*] located in [\_\_\_\_] County, Washington, from State, and State desires to lease the property to Tenant pursuant to the terms and conditions of this Lease.

THEREFORE, the parties agree as follows:

**SECTION 1 PROPERTY**

**1.1 Property Defined.** State leases to Tenant and Tenant leases from State the real property described in Exhibit A, together with all the rights of State, if any, to improvements on and easements benefiting the property (collectively the "Property"), but subject to the exceptions and restrictions set forth in this Lease. This Lease is subject to all valid interests of third parties noted in the records of [\_\_\_\_] County, or on file in the office of the Commissioner of Public Lands, Olympia, Washington; rights of the public under the Public Trust Doctrine or the federal navigation servitude; and treaty rights of Indian Tribes. Not included in this Lease are any right to harvest, collect or damage any natural resource, including aquatic life or living plants, any water rights, or any mineral rights, including any right to excavate or withdraw sand, gravel, or other valuable materials. State reserves the right to grant easements and other land uses on the

Property to others when the easement or other land uses will not unreasonably interfere with Tenant's Permitted Use.

**1.2 Survey, Maps, and Plans.** In executing this Lease, State is relying on the surveys, plats, diagrams, and/or legal descriptions provided by Tenant. Tenant is not relying upon and State is not making any representations about any survey, plat, diagram, and/or legal description provided by State.

**1.3 Inspection.** State makes no representation regarding the condition of the Property, improvements located on the Property, the suitability of the Property for Tenant's Permitted Use, compliance with governmental laws and regulations, availability of utility rights, access to the Property or the existence of hazardous substances on the Property. Tenant has inspected the Property and accepts it "AS IS."

## SECTION 2 USE

**2.1 Permitted Use.** Tenant shall use the Property for meeting the proposed conservation goals, described in Exhibit B, by conducting [*restoration –AND/OR – enhancement –AND/OR- creation –AND/OR- preservation*] of aquatic habitat (the "Permitted Use"), and for no other purpose. Activities completed under a regulatory framework should not be authorized under a conservation lease. Similarly, conservation activities accomplished under a conservation lease should not be applied to gain compensatory mitigation or natural resource damage credits.

The Permitted Use is described or shown in greater detail in Exhibit B, the terms and conditions of which are incorporated by reference and made a part of this Lease. The parties agree that this is a water-dependent use. After completion of the [*restoration - AND/OR- enhancement -AND/OR creation AND/OR preservation*] as described or shown in Exhibit B, Tenant shall maintain the existence and functioning of the [*restored - AND/OR- enhanced -AND/OR- created AND/OR preserved*] aquatic habitat on the Property at all times for the duration of the Lease.

**2.2 Restrictions on Use.** Tenant shall not cause or permit any of its employees, agents, or any other person acting under Tenant's direction or control to cause any damage to natural resources on the Property[, *except to the extent such damage is expressly permitted under the conservation plan incorporated in Exhibit B*]. Tenant shall also not cause any filling activity to occur on the Property or permit any of its employees, agents, or any other person acting under Tenant's direction or control to conduct any such activity[, *except to the extent such damage is expressly permitted under the conservation plan incorporated in Exhibit B*]. This prohibition includes any deposit of rock, earth, ballast, refuse, garbage, waste matter (including chemical, biological or toxic wastes), hydrocarbons, any other pollutants, or other matter in or on the Property, except as approved in writing by State. Tenant shall neither commit nor permit any of its employees, agents, or any other person acting under Tenant's direction and control to commit nor allow waste on the Property.

If there is any unanticipated damage, filling, or waste caused by the Tenant, its employees, agents or any other person acting under the Tenant's direction or control, or if the Tenant fails to comply with all or any of the restrictions on the use of the Property set out in this Subsection 2.2, State shall notify Tenant and provide Tenant a reasonable time to take all steps necessary to remedy the failure. If Tenant fails to do so in a timely manner, then State may take any steps reasonably necessary to remedy this failure. Upon demand by State, Tenant shall pay the costs of such remedial action, to the extent that the damage, filling, or waste was caused or permitted by Tenant, its employees, agents, or any other person acting under Tenant's directions, is in violation of the foregoing provisions, including but not limited to the reasonable costs of removing and disposing of any material deposited improperly on the Property. Neither the foregoing provisions nor any other provisions of this Lease shall, however, be construed to create any liability on the part of the Tenant for the activities of anyone other than the Tenant, its employees, agents, or other persons acting on behalf of the Tenant, whether committed on or off of the Property. This section shall not in any way limit Tenant's liability under Section 8, below.

**2.3 Conformance with Laws.** Tenant shall, at all times, keep current and comply with all conditions and terms of any permits, licenses, certificates, regulations, ordinances, statutes, and other government rules and regulations regarding its use or occupancy of the Property.

**2.4 Liens and Encumbrances.** Tenant shall keep the Property free and clear of any liens and encumbrances arising out of or relating to its use or occupancy of the Property.

### SECTION 3 TERM

**3.1 Term Defined.** The term of this Lease is [\_\_\_\_\_] (\_\_) years (the "Term"), beginning on the [\_\_\_\_\_] day of [\_\_\_\_\_, \_\_\_\_] (the "Commencement Date"), and ending on the [\_\_\_\_\_] day of [\_\_\_\_\_, \_\_\_\_] (the "Termination Date"), unless terminated sooner under the terms of this Lease.

**3.2 Hold Over.** If Tenant remains in possession of the Property after the Termination Date, the occupancy shall not be an extension or renewal of the Term. The occupancy shall be a month-to-month tenancy, on terms identical to the terms of this Lease, which may be terminated by either party on thirty (30) days written notice. The monthly rent during the holdover shall be the same rent which would be due if the Lease were still in effect and all adjustments in rent were made in accordance with its terms. If State provides a notice to vacate the Property in anticipation of the termination of this Lease or at any time after the Termination Date and Tenant fails to do so within the time set forth in the notice, then Tenant shall be a trespasser and shall owe the State all amounts due under RCW 79.01.760 or other applicable law.

**3.3 End of Term.** Tenant shall use its reasonable best efforts to ensure that, prior to the Termination Date or earlier termination under Section 13 or otherwise, Tenant shall

carry out the activities called for in this lease by *[restoring -AND/OR-enhancing - AND/OR- creating – AND/OR preserving]* aquatic habitat described in Exhibit B, with the goal of {state the goal}. If actions, not included in the approved conservation plan are carried out and result in conditions that are deleterious to the Property or natural resources on the Property, or result in conditions that pose a threat to human health or safety, State shall have sole discretion to require Tenant to take all steps necessary to restore the Property to the condition it was in prior to the initiation of such actions. This section shall not require Tenant, to restore any changed conditions caused solely by parties other than Tenant, its employees, agents, or any other person acting on behalf of the Tenant. If Tenant fails to restore the Property as required in this section, State may take any steps reasonably necessary to restore the Property. Upon demand by State, Tenant shall pay all costs of such restoration. This section shall not in any way limit Tenant's liability under Section 8, below.

## **SECTION 4 RENT**

**4.1 Annual Rent.** Until adjusted as set forth below, Tenant shall pay to State an annual rent of *[\_\_\_\_\_]* Dollars (\$*[\_\_\_\_\_]*). The annual rent, as it currently exists or as adjusted or modified (the "Annual Rent"), shall be due and payable in full on or before the Commencement Date and on or before the same date of each year thereafter.

**4.2 Payment Place.** Payment is to be made to Financial Management Division, 1111 Washington St SE, PO Box 47041, Olympia, WA 98504-7041.

**4.3 Adjustment Based on Use.** Annual Rent is based on Tenant's Permitted Use of the Property, as described in Section 2 above. If Tenant's Permitted Use changes, the Annual Rent shall be adjusted as appropriate for the changed use.

### **4.4 Rent Adjustments for Water-Dependent Uses.**

- (a) **Inflation Adjustment.** State shall adjust the water-dependent rent annually pursuant to RCW 79.90.450 - .902, except in those years in which the rent is revalued under Subsection 4.4(b) below. This adjustment shall be effective on the anniversary of the Commencement Date.
- (b) **Revaluation of Rent.** State shall, at the end of the first four-year period of the Term, and at the end of each subsequent four-year period, revalue the water-dependent Annual Rent in accordance with RCW 79.90.450 - .902.
- (c) **Rent Cap.** After the initial year's rent is determined under Subsection 4.1, rent may increase by operation of Subsection 4.4(a) or 4.4(b). If application of the statutory rent formula for water-dependent uses would result in an increase in the rent attributable to such uses of more than fifty percent (50%) in any one year, the actual increase implemented in such year shall be limited to fifty percent (50%) of the then-existing rent, in

accordance with RCW 79.90.490. The balance of the increase determined by the formula shall be deferred to subsequent years and added to the next and subsequent years' rental increases until the full amount of the increase is lawfully implemented.

#### **4.5 Rent Adjustment Procedures.**

- (a) Notice of Rent Adjustment. Notice of any adjustments to the Annual Rent that are allowed by Subsection shall be provided to Tenant in writing no later than ninety (90) days after the anniversary date of the Lease.
- (b) Procedures on Failure to make Timely Adjustment In the event the State fails to provide the notice required in Subsection 4.5(a), it shall be prohibited from collecting any adjustments to rent only for the year in which it failed to provide notice. No failure by State to adjust Annual Rent pursuant to Subsection 4.5(a) shall affect the State's right to establish Annual Rent for a subsequent lease year as if the missed or waived adjustment had been implemented. The State may adjust, bill, and collect Annual Rent prospectively as if any missed or waived adjustments had actually been implemented. This includes the implementation of any inflation adjustment and any rent revaluations that would have been authorized for previous lease years.

### **SECTION 5 OTHER EXPENSES**

During the Term, Tenant shall pay all fees charged for utilities in connection with the use and occupancy of the Property, including but not limited to electricity, water, gas, and telephone service. Tenant shall also pay all taxes (including leasehold excise taxes), assessments, and other governmental charges, of any kind whatsoever, applicable or attributable to the Property, Tenant's leasehold interest, the improvements, or Tenant's use and enjoyment of the Property.

### **SECTION 6 LATE PAYMENTS AND OTHER CHARGES**

**6.1 Late Charge.** If any rental payment is not received by State within ten (10) days of the date due, Tenant shall pay to State a late charge equal to four percent (4%) of the amount of the payment or Fifty Dollars (\$50), whichever is greater, to defray the overhead expenses of State as a result of the delay.

**6.2 Interest Penalty for Past Due Rent and Other Sums Owed.** If rent is not received by State within thirty (30) days of the date due, Tenant shall, in addition to paying late charges determined under Subsection 6.1, pay interest on the amount outstanding at the rate of one percent (1%) per month until paid. If State pays or advances any amount for or on behalf of Tenant, including, but not limited to, leasehold taxes pursuant to Chapter 82.29A RCW, Tenant shall reimburse State for the amount paid

or advanced and shall pay interest on that amount at the rate of one percent (1%) per month from the date State notifies Tenant of the payment or advance.

**6.3 No Counterclaim, Setoff, or Abatement of Rent.** Except as expressly set forth elsewhere in this Lease, rent and all other sums payable by Tenant pursuant to this Lease shall be paid without the requirement that State provide prior notice or demand, and shall not be subject to any counterclaim, setoff, deduction, defense or abatement.

## SECTION 7 IMPROVEMENTS

**7.1 Existing Improvements.** On the Commencement Date, the following improvements are located on the Property:

[\_\_\_\_\_]. The improvements *[are -OR- are not]* owned by State *[("State-Owned Improvements") -OR- ("Existing Improvements").]* *[If the improvements were placed on the Property by a former tenant, and less than three (3) years has passed since the expiration of the last lease, then Tenant shall pay the appraised value of the improvements to the former tenant, if and to the extent required by RCW 79.94.320 or RCW 79.95.040, prior to State entering into this Lease.]*

**7.2 New Improvements.** So long as this Lease remains in effect, no new improvements shall be placed on the Property without (a) State's prior written consent, which shall not be unreasonably withheld, and (b) Tenant's acquisition of a performance and payment bond, in an amount equal to *[150% -OR- \_\_\_\_%]* of the estimated cost of constructing and installing the new improvements.

**7.3 Unauthorized Improvements.** Improvements made on the Property without State's prior written consent or which are not in conformance with the plans submitted to and approved by the State ("Unauthorized Improvements") shall immediately become the property of State, unless State elects otherwise. Regardless of ownership of Unauthorized Improvements, State may, at its option, require Tenant to sever, remove and dispose of them, charge Tenant rent for the use of them, or both.

**7.4 Removal of Improvements.** All Tenant-owned improvements and all Unauthorized Improvements shall be removed by Tenant from the Property on or before the Termination Date unless State consents that the improvements may remain. If such improvements remain on the Property after the Termination Date without State's consent, State may elect to remove the improvements and Tenant shall, upon demand, pay the costs of removing and disposing of them.

## SECTION 8 ENVIRONMENTAL LIABILITY/RISK ALLOCATION

**8.1 Definition.** "Hazardous Substance" means any substance which now or in the future becomes regulated or defined under any federal, state, or local statute, ordinance, rule, regulation, or other law relating to human health, environmental protection, contamination or cleanup, including, but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42



U.S.C. 9601 *et seq.*, and Washington's Model Toxics Control Act ("MTCA"), RCW 70.105D.010 *et seq.*

**8.2 Use of Hazardous Substances.** Tenant covenants and agrees that Hazardous Substances will not be used, stored, generated, processed, transported, handled, released, or disposed of in, on, under, or above the Property, except in accordance with all applicable laws.

**8.3 Current Conditions, Duty of Utmost Care, and Duty to Investigate.**

- (a) *[State makes no representation about the condition of the Property. Hazardous Substances may exist in, on, under, or above the Property. - OR- State makes no representations about the condition of the Property, except as follows: Hazardous Substances, including those identified in the Sediment Investigation Report attached as Exhibit C, are known to exist in, on, under, or above the Property.]* With regard to any Hazardous Substances that may exist in, on, under, or above the Property, State disclaims any and all responsibility to conduct investigations, to review any State records, documents or files, or to obtain or supply any information to Tenant.
- (b) Tenant shall exercise the utmost care with respect to both Hazardous Substances in, on, under, or above the Property as of the Commencement Date, and any Hazardous Substances that come to be located in, on, under, or above the Property during the Term of this agreement, along with the foreseeable acts or omissions of third parties affecting those Hazardous Substances, and the foreseeable consequences of those acts or omissions. The obligation to exercise utmost care under this Subsection 8.3 includes, but is not limited to, the following requirements:
  - (1) Tenant shall not undertake activities that will cause, contribute to, or exacerbate contamination of the Property;
  - (2) Tenant shall not undertake activities that damage or interfere with the operation of remedial or restoration activities on the Property or undertake activities that result in human or environmental exposure to contaminated sediments on the Property;
  - (3) Tenant shall not undertake any activities that result in the mechanical or chemical disturbance of on-site habitat mitigation;
  - (4) If requested, Tenant shall allow reasonable access to the Property by employees and authorized agents of the Environmental Protection Agency, the Washington State Department of Ecology, or other similar environmental agencies; and

- (5) If requested, Tenant shall allow reasonable access to potentially liable or responsible parties who are the subject of an order or consent decree which requires access to the Property. Tenant's obligation to provide access to potentially liable or responsible parties may be conditioned upon the negotiation of an access agreement with such parties, provided that such agreement shall not be unreasonably withheld.
- (c) It shall be Tenant's obligation to gather sufficient information concerning the Property and the existence, scope, and location of any Hazardous Substances on the Property, or adjoining the Property, that allows Tenant to effectively meet its obligations under this lease.

#### **8.4 Notification and Reporting.**

- (a) Tenant shall immediately notify State if Tenant becomes aware of any of the following:
  - (1) A release or threatened release of Hazardous Substances in, on, under, or above the Property, any adjoining property, or any other property subject to use by Tenant in conjunction with its use of the Property;
  - (2) Any problem or liability related to, or derived from, the presence of any Hazardous Substance in, on, under, or above the Property, any adjoining property, or any other property subject to use by Tenant in conjunction with its use of the Property;
  - (3) Any actual or alleged violation of any federal, state, or local statute, ordinance, rule, regulation, or other law pertaining to Hazardous Substances with respect to the Property, any adjoining property, or any other property subject to use by Tenant in conjunction with its use of the Property;
  - (4) Any lien or action with respect to any of the foregoing; or,
  - (5) Any notification from the US Environmental Protection Agency (EPA) or the Washington State Department of Ecology (DOE) that remediation or removal of Hazardous Substances is or may be required at the Property.
- (b) Upon request, Tenant shall provide State with copies of any and all reports, studies, or audits which pertain to environmental issues or concerns associated with the Property, and which were prepared for Tenant and submitted to any federal, state or local authorities pursuant to any federal, state or local permit, license or law. These permits include,

but are not limited to, any National Pollution Discharge and Elimination System Permit, any Army Corps of Engineers permit, any State Hydraulics permit, any State Water Quality certification, or any Substantial Development permit.

## **8.5 Indemnification.**

- (a) Tenant shall fully indemnify, defend, and hold State harmless from and against any and all claims, demands, damages, natural resource damages, response costs, remedial costs, cleanup costs, losses, liens, liabilities, penalties, fines, lawsuits, other proceedings, costs, and expenses (including attorneys' fees and disbursements), that arise out of, or are in any way related to:
  - (1) The use, storage, generation, processing, transportation, handling, or disposal of any Hazardous Substance by Tenant, its subtenants, contractors, agents, employees, guests, invitees, or affiliates in, on, under, or above the Property, any adjoining property, or any other property subject to use by Tenant in conjunction with its use of the Property, during the Term of this Lease or during any time when Tenant occupies or occupied the Property or any such other property;
  - (2) The release or threatened release of any Hazardous Substance, or the exacerbation of any Hazardous Substance contamination, in, on, under, or above the Property, any adjoining property, or any other property subject to use by Tenant in conjunction with its use of the Property, which release, threatened release, or exacerbation occurs or occurred during the Term of this Lease or during any time when Tenant occupies or occupied the Property or any such other property, and as a result of:
    - (i) Any act or omission of Tenant, its subtenants, contractors, agents, employees, guests, invitees, or affiliates; or,
    - (ii) Any foreseeable act or omission of a third party unless Tenant exercised the utmost care with respect to the foreseeable acts or omissions of the third party and the foreseeable consequences of those acts or omissions.
- (b) In addition to the indemnifications provided in Subsection 8.5(a), Tenant shall fully indemnify State for any and all damages, liabilities, costs or expenses (including attorneys' fees and disbursements) that arise out of or are in any way related to Tenant's breach of the obligations of Subsection 8.3(b). This obligation is not intended to duplicate the indemnity provided in Subsection 8.5(a) and applies only to damages, liabilities, costs, or

expenses that are associated with a breach of Subsection 8.3(b) and which are not characterized as a release, threatened release, or exacerbation of Hazardous Substances.

**8.6 Cleanup.** If a release of Hazardous Substances occurs in, on, under, or above the Property, or other State-owned property, arising out of any action, inaction, or event described or referred to in Subsection 8.5, above, Tenant shall, at its sole expense, promptly take all actions necessary or advisable to clean up the Hazardous Substances. Cleanup actions shall include, without limitation, removal, containment and remedial actions and shall be performed in accordance with all applicable laws, rules, ordinances, and permits. Tenant's obligation to undertake a cleanup under this Subsection 8.6 shall be limited to those instances where the Hazardous Substances exist in amounts that exceed the threshold limits of any applicable regulatory cleanup standards. Tenant shall also be solely responsible for all cleanup, administrative, and enforcement costs of governmental agencies, including natural resource damage claims, arising out of any action, inaction, or event described or referred to in Subsection 8.5, above. Tenant may undertake a cleanup pursuant to the Washington State Department of Ecology's Voluntary Cleanup Program, provided that: (1) Any cleanup plans shall be submitted to State (DNR) for review and comment at least thirty (30) days prior to implementation (except in emergency situations), and (2) Tenant must not be in breach of this lease. Nothing in the operation of this provision shall be construed as an agreement by State that the voluntary cleanup complies with any laws or with the provisions of this Lease.

**8.7 Sampling by State, Reimbursement, and Split Samples.**

- (a) State may conduct sampling, tests, audits, surveys, or investigations ("Tests") of the Property at any time to determine the existence, scope, or effects of Hazardous Substances on the Property, any adjoining property, any other property subject to use by Tenant in conjunction with its use of the Property, or any natural resources. If such Tests, along with any other information, demonstrates the existence, release, or threatened release of Hazardous Substances arising out of any action, inaction, or event described or referred to in Subsection 8.5, above, Tenant shall promptly reimburse State for all costs associated with such Tests.
- (b) State's ability to seek reimbursement for any Tests under this Subsection shall be conditioned upon State providing Tenant written notice of its intent to conduct any Tests at least thirty (30) calendar days prior to undertaking such Tests, unless such Tests are performed in response to an emergency situation in which case State shall only be required to give such notice as is reasonably practical.
- (c) Tenant shall be entitled to obtain split samples of any Test samples obtained by State, but only if Tenant provides State with written notice requesting such samples within twenty (20) calendar days of the date Tenant is deemed to have received notice of State's intent to conduct any

non-emergency Tests. The additional cost, if any, of split samples shall be borne solely by Tenant. Any additional costs State incurs by virtue of Tenant's split sampling shall be reimbursed to State within thirty (30) calendar days after a bill with documentation for such costs is sent to Tenant.

- (d) Within thirty (30) calendar days of a written request (unless otherwise required pursuant to Subsection 8.4(b), above), either party to this Lease shall provide the other party with validated final data, quality assurance/quality control information, and chain of custody information, associated with any Tests of the Property performed by or on behalf of State or Tenant. There is no obligation to provide any analytical summaries or expert opinion work product.

#### **[8.8 Sediment Investigation.**

- (a) *As a part of the screening of Tenant's application to make use of state-owned aquatic lands, State has been provided with certain environmental information that relates to Hazardous Substances which may exist in, on, under, or above the Property as of the Commencement Date of this Lease. This information has been incorporated into Exhibit C (Sediment Investigation Report). State makes no representations or warranties of any kind or nature regarding the accuracy, completeness or any other matter relating to Exhibit C.*
- (b) *If State has reason to believe that a release or threatened release of Hazardous Substances has occurred on the Property during Tenant's occupancy, State may require Tenant to conduct a Closeout Environmental Assessment (Closeout Assessment) by providing Tenant with written notice of this requirement no later than one hundred eighty (180) calendar days prior to the Termination Date, or within ninety (90) days of any valid notice to terminate the lease earlier than originally agreed. The purpose of the Closeout Assessment shall be to determine the existence, scope, or effects of any Hazardous Substances on the Property and any associated natural resources. If the initial results of the Closeout Assessment disclose the existence of Hazardous Substances that may have migrated to other property, State may require additional Closeout Assessment work to determine the existence, scope, and effect of any Hazardous Substances on adjoining property, any other property subject to use by Tenant in conjunction with its use of the Property, or on any associated natural resources. The Closeout Assessment may include Sediment Sampling. Any Sediment Sampling must include those sample locations and parameters reported in Tenant's Sediment Investigation Report completed at the initiation of this Lease as well as any additional testing requirements State may require based on changes in scientific, statutory, or regulatory standards for information*

*concerning the activities of Tenant, its subtenants, contractors, agents, employees, guests, invitees, or affiliates.*

- (c) *Prior to undertaking the Closeout Assessment, Tenant shall submit a proposed plan in writing for State's approval. The plan shall be provided to State within sixty (60) days of the State's notice requiring the Closeout Assessment. If State fails to respond in writing, either approving or disapproving of the proposed plan, within sixty (60) days of its receipt, the proposed plan shall be deemed approved. Tenant shall be responsible for all costs required to complete planning, sampling, analyzing, and reporting associated with the Closeout Assessment.*

**8.8[9] Reservation of Rights.** The parties have agreed to allocate certain environmental risks, liabilities, and responsibilities by the terms of Section 8. With respect to those environmental liabilities covered by the indemnification provisions of Subsection 8.5, that subsection shall exclusively govern the allocation of those liabilities. With respect to any environmental risks, liabilities, or responsibilities not covered by Subsection 8.5, the parties expressly reserve and do not waive or relinquish any rights, claims, immunities, causes of action, or defenses relating to the presence, release, or threatened release of Hazardous Substances in, on, under, or above the Property, any adjoining property, or any other property subject to use by Tenant in conjunction with its use of the Property, that either party may have against the other under federal, state, or local laws, including but not limited to, CERCLA, MTCA, and the common law. No right, claim, immunity, or defense either party may have against third parties is affected by this Lease and the parties expressly reserve all such rights, claims, immunities, and defenses. The allocations of risks, liabilities, and responsibilities set forth above do not release either party from, or affect either party's liability for, claims or actions by federal, state, or local regulatory agencies concerning Hazardous Substances.

## **SECTION 9 ASSIGNMENT AND SUBLETTING**

Tenant shall not mortgage, assign, sublet, or otherwise transfer Tenant's interest in this Lease without State's prior written consent, which shall not be unreasonably conditioned or withheld.

## **SECTION 10 INDEMNITY, FINANCIAL SECURITY, INSURANCE**

**10.1 Indemnity.** Tenant shall indemnify, defend, and hold harmless State, its employees, officers, and agents from any and all liability, damages (including bodily injury, personal injury and damages to land, aquatic life, and other natural resources), expenses, causes of action, suits, claims, costs, fees (including attorneys' fees), penalties, or judgments, of any nature whatsoever, arising out of the use, occupation, or control of the Property by Tenant, its subtenants, invitees, agents, employees, licensees, or permittees, except as may arise solely out of the willful or negligent act of State or State's elected officials, employees, or agents. To the extent that RCW 4.24.115 applies, Tenant shall not be required to indemnify, defend, and hold State harmless from State's sole or

concurrent negligence. Tenant's liability to State for hazardous substances, and its obligation to indemnify, defend, and hold the State harmless for hazardous substances, shall be governed exclusively by Section 8.

## **10.2 Financial Security.**

- (a) At its own expense, Tenant shall procure and maintain a corporate surety bond or provide other financial security satisfactory to State (the "Bond") in an amount equal to [\_\_\_\_\_] Dollars (\$[\_\_\_\_\_] ), which shall secure Tenant's full performance of its obligations under this Lease, with the exception of the obligations under Section 8 (Environmental Liability/Risk Allocation) above. The Bond shall be in a form and issued by a surety company acceptable to State. State may require an adjustment in the amount of the Bond:
  - (1) To reflect any adjustments in Annual Rent; or,
  - (2) Upon a material change in either the Permitted Use or the condition of any improvements.
- (b) Upon any default by Tenant in its obligations under this Lease, State may collect on the Bond to offset the liability of Tenant to State. Collection on the Bond shall not relieve Tenant of liability, shall not limit any of State's other remedies, and shall not reinstate or cure the default or prevent termination of the Lease because of the default.

**10.3 Insurance.** At its own expense, Tenant shall procure and maintain during the Term of this Lease, the insurance coverages and limits described in Subsections 10.3(a) and (b) below. This insurance shall be issued by an insurance company or companies admitted and licensed by the Insurance Commissioner to do business in the State of Washington. Insurers must have a rating of B+ or better by "Best's Insurance Reports," or a comparable rating by another rating company acceptable to State. If non-admitted or non-rated carriers are used, the policies must comply with Chapter 48.15 RCW.

- (a) Types of Required Insurance.
  - (1) Commercial General Liability Insurance. Tenant shall procure and maintain Commercial General Liability insurance and, or Personal Liability insurance, as applicable. Such insurance may be provided under a personal liability insurance policy, commercial liability insurance policy, or package property and liability insurance policy. All insurance shall specifically cover liability arising out of premises, operations, personal injury and liability assumed under an insured contract (this lease), including the tort liability of another party. Tenant shall also procure and maintain, if applicable, Marina Operators Legal Liability insurance covering

claims for bodily injury, personal injury, or property damage arising on the Property and/or arising out of Tenant's operations. If necessary, commercial umbrella insurance covering claims for these risks shall be procured and maintained. Insurance must include liability coverage with limits not less than those specified below:

Description

Each Occurrence	<i>[\$1,000,000 -OR- \$ _____]</i>
General Aggregate Limit	<i>[\$2,000,000 -OR- \$ _____]</i>

State may impose changes in the limits of liability:

- (i) As a condition of approval of assignment or sublease of this Lease;
  - (ii) Upon any breach of Section 8, above;
  - (iii) Upon a material change in the condition of the Property or any improvements; or,
  - (iv) Upon a change in the Permitted Use. New or modified insurance coverage shall be in place within thirty (30) days after changes in the limits of liability are required by State.
- (2) Property Insurance. Tenant shall procure and maintain property insurance covering all real property located on or constituting a part of the Property in an amount equal to the replacement value of all improvements on the Property. Such insurance may have commercially reasonable deductibles.
- (3) Worker's Compensation/Employer's Liability Insurance. Tenant shall procure and maintain:
- (i) State of Washington Worker's Compensation coverage, as applicable, with respect to any work by Tenant's employees on or about the Property and on any improvements;
  - (ii) Employers Liability or "Stop Gap" insurance coverage with limits not less than those specified below. Insurance must include bodily injury coverage with limits not less than those specified below:

Each Employee	Policy Limit	
<u>By Accident</u>	<u>By Disease</u>	<u>By Disease</u>
<i>[\$1,000,000 -OR- \$ _]</i>	<i>[\$1,000,000 -OR- \$ _]</i>	<i>[\$1,000,000 -OR- \$ _]</i>



- (iii) Longshore and Harbor Worker's Act and Jones Act coverage, as applicable, with respect to any work by Tenant's employees on or about the Property and on any improvements.
- (4) **Builder's Risk Insurance.** As applicable, Tenant shall procure and maintain builder's risk insurance in an amount reasonably satisfactory to State during construction, replacement, or material alteration of the Property or improvements on the Property. Coverage shall be in place until such work is completed and evidence of completion is provided to State.
- (5) **Business Auto Policy Insurance.** As applicable, Tenant shall procure and maintain a business auto policy. The insurance must include liability coverage with limits not less than those specified below:

<u>Description</u>	<u>Each Accident</u>
Bodily Injury and Property Damage	\$1,000,000

***[(6) Aviation Liability Insurance. Tenant shall procure and maintain insurance covering liability arising from ownership, maintenance or use of aircraft, including liability assumed under an insurance contract. The insurance must include liability coverage with limits not less than those specified below:***

***General***

<u>Description</u>	<u>Per Seat</u>	<u>Aggregate</u>
<b><i>Bodily Injury and Property Damage</i></b>	<b><i>\$1,000,000</i></b>	<b><i>\$5,000,000]</i></b>

- (b) **Terms of Insurance.** The policies required under Subsection 10.3 shall name the State of Washington, Department of Natural Resources as an additional insured (except for State of Washington Worker's Compensation coverage, and Federal Jones' Act and Longshore and Harbor Worker's Act coverages). In those cases where Commercial General Liability insurance is not required, State may agree to waive the requirement that it be named as an additional insured if no insurer will agree to this term. State's waiver must be in writing. If Tenant's policy of insurance does not name State as an additional insured, Tenant waives all rights against State for recovery of damages to the extent those damages are covered by liability and/or property insurance maintained pursuant to this Lease, and State shall have the ability to increase the coverage limits specified in this Lease. Furthermore, all policies of insurance described in Subsection 10.3 shall meet the following requirements:

- (1) Policies shall be written as primary policies not contributing with and not in excess of coverage that State may carry;
- (2) Policies shall expressly provide that such insurance may not be canceled or nonrenewed with respect to State except upon forty-five (45) days prior written notice from the insurance company to State;

To the extent of State's insurable interest, property coverage shall expressly provide that all proceeds shall be paid jointly to State and Tenant;

All liability policies must provide coverage on an occurrence basis; and

Liability policies shall not include exclusions for cross liability.

- (c) **Proof of Insurance.** Tenant shall furnish evidence of insurance in the form of a Certificate of Insurance satisfactory to the State accompanied by a checklist of coverages provided by State, executed by a duly authorized representative of each insurer showing compliance with the insurance requirements described in section 10, and, if requested, copies of policies to State. The Certificate of Insurance shall reference the State of Washington, Department of Natural Resources and the lease number. Receipt of such certificates or policies by State does not constitute approval by State of the terms of such policies. Tenant acknowledges that the coverage requirements set forth herein are the minimum limits of insurance the Tenant must purchase to enter into this agreement. These limits may not be sufficient to cover all liability losses and related claim settlement expenses. Purchase of these limits of coverage does not relieve the Tenant from liability for losses and settlement expenses greater than these amounts.

**10.4 State's Acquisition of Insurance.** If Tenant fails to procure and maintain the insurance described above within fifteen (15) days after Tenant receives a notice to comply from State, State shall have the right to procure and maintain comparable substitute insurance and to pay the premiums. Tenant shall pay to State upon demand the full amount paid by State, together with interest at the rate provided in Subsection 6.2 from the date of State's notice of the expenditure until Tenant's repayment.

***[10.5 Self-Insurance. Grantee warrants that it has the capacity to self insure for the risks and coverages specified in Subsection 10.2. Grantee's obligations under Subsection 10.2 may be met by providing evidence of self-insurance that is acceptable to the State. Any evidence of Grantee's proof of self insurance by State must be obtained in writing. The decision to accept, or reject, Grantee's proof of self-insurance is within the sole discretion of State. Grantee must provide State with proof of continuing ability to provide self-insurance within thirty (30) days of any written***

*request by State for such proof. Grantee shall also provide State with written notice within seven (7) days of any material change in its ability to self insure, or to its program of self-insurance. If Grantee elects to discontinue its program of self-insurance, or if State provides written notice withdrawing its acceptance of Grantee's proof of self-insurance, Grantee shall be subject to the requirements of Subsections 10.2 and 10.3. Grantee shall be in compliance with the requirements of Subsection 10.2 prior to exercising an election to terminate self-insurance coverage and shall comply with those requirements within thirty (30) days of receipt of any notice from State withdrawing its consent to self-insurance.]*

## **SECTION 11 MAINTENANCE AND REPAIR**

Tenant shall, at its sole cost and expense, keep and maintain the Property and all improvements (regardless of ownership) in good order and repair, in a clean, attractive, and safe condition. State shall not be required to make any alterations, maintenance, replacements, or repairs in, on, or about the Property, or any part thereof, during the Term.

## **SECTION 12 DAMAGE OR DESTRUCTION**

In the event of any damage to or destruction of the Property or any improvements, Tenant shall promptly give written notice to State. Unless otherwise agreed in writing, Tenant shall promptly reconstruct, repair, or replace the Property as nearly as possible to its condition immediately prior to such damage or destruction.

## **SECTION 13 DEFAULT AND REMEDIES**

- (a) Tenant shall be in default of this Lease on the occurrence of any of the following: Failure to pay rent or other expenses when due; Failure to complete and maintain the *[restored –AND/OR- enhanced –AND/OR- created –AND/OR- preserved]* aquatic habitat characteristics on the Property as described in Exhibit B; Failure to comply with any law, regulation, policy, or order of any lawful governmental authority; Failure to comply with any other provision of this Lease; Two or more defaults over a period of time, or a single serious default, that demonstrates a reasonable likelihood of future defaults in the absence of corrective action by Tenant; or, Proceedings commenced by or against Tenant under any bankruptcy act or for the appointment of a trustee or receiver of Tenant's property.
- (b) A default shall become an event of default ("Event of Default") if Tenant fails to cure the default within *[sixty (60) days –OR- the applicable cure period]* after State provides Tenant with written notice of default, which

specifies the nature of the default. *[For failure to pay rent or other monetary defaults, the cure period shall be ten (10) days. For other defaults, the cure period shall be thirty (30) days.]*

- (c) Upon an Event of Default, State may terminate this Lease and remove Tenant by summary proceedings or otherwise. Upon an Event of Default, State may terminate this Lease, remove Tenant by summary proceedings or otherwise, and seek any remedy available under Section 3.3. State may also, without terminating this Lease, relet the Property on any terms and conditions as State in its sole discretion may decide are appropriate. Tenant will be liable for all costs and damages incurred by the State, including the costs of re-letting and the difference in rent between this and any new lease.
- (d) State's acceptance of a rental payment shall not be construed to be a waiver of any preceding or existing breach other than the failure to pay the particular rental payment that was accepted.

#### **SECTION 14 ENTRY BY STATE**

State shall have the right to enter the Property at any reasonable hour to inspect for compliance with the terms of this Lease.

#### **SECTION 15 DISCLAIMER OF QUIET ENJOYMENT**

As indicated in Section 1.1, this Lease is subject to all valid recorded interests of third parties, as well as rights of the public under the Public Trust Doctrine or federal navigation servitude, and treaty rights of Indian Tribes. State believes that its grant of the Lease is consistent with the Public Trust Doctrine and that none of the identified interests of third parties will materially and adversely affect Tenant's right of possession and use of the Property as set forth herein, but makes no guaranty or warranty to that effect. Tenant and State expressly agree that Tenant shall be responsible for determining the extent of its right to possession and for defending its leasehold interest. Consequently, State expressly disclaims and Tenant expressly releases State from any claim for breach of any implied covenant of quiet enjoyment with respect to the possession of the Property. This disclaimer includes, but is not limited to, interference arising from or in connection with access or other use rights of adjacent property owners or the public over the water surface or in or under the water column, including rights under the Public Trust Doctrine; rights held by Indian Tribes; and the general power and authority of State and the United States with respect to aquatic lands, navigable waters, bedlands, tidelands, and shorelands. In the event Tenant is evicted from the Property by reason of successful assertion of any of these rights, this Lease shall terminate as of the date of the eviction. In the event of a partial eviction, Tenant's rent obligations shall abate as of the date of the partial eviction in direct proportion to the extent of the eviction, but in all other respects, this Lease shall remain in full force and effect.

## SECTION 16 NOTICE

Any notices required or permitted under this Lease may be personally delivered, delivered by facsimile machine, or mailed by certified mail, return receipt requested, to the following addresses or to such other places as the parties may direct in writing from time to time:

State: DEPARTMENT OF NATURAL RESOURCES  
*Region Name*  
*Region Address*

Tenant: [\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_]

A notice shall be deemed given and delivered upon personal delivery, upon receipt of a confirmation report if delivered by facsimile machine, or three days after being mailed as set forth above, whichever is applicable.

## SECTION 17 TIME IS OF THE ESSENCE

TIME IS OF THE ESSENCE as to each and every provision of this Lease.

## SECTION 18 ENTIRE AGREEMENT

This Lease, including the exhibits and addenda, if any, contains the entire agreement of the parties. All prior and contemporaneous agreements, promises, representations and statements relating to this transaction or to the Property, if any, are merged into this Lease.

## SECTION 19 APPLICABLE LAW AND VENUE

This Lease is entered into by State pursuant to the authority granted it in Chapters 79.90 to 79.96 RCW and the Constitution of the State of Washington. This Lease shall be interpreted and construed in accordance with and shall be subject to the laws of the State of Washington. Any reference to a statute enacted by the State of Washington shall mean that statute as presently enacted or hereafter amended or superseded. Venue for any action arising out of or in connection with this Lease shall be in the Superior Court for Thurston County, Washington.

## SECTION 20 RECORDATION

Tenant shall record this Lease or a memorandum documenting the existence of this Lease in the county in which the Property is located, at Tenant's sole expense. The memorandum shall, at a minimum, contain the Property description, the names of the parties to the Lease, the State's lease number, and the duration of the Lease. Tenant shall

provide State with recording information, including the date of recordation and file number. Tenant shall have thirty (30) days from the date of delivery of the final executed agreement to comply with the requirements of this section. If Tenant fails to record this Lease, State may record it and Tenant shall pay the costs of recording upon State's demand.

## SECTION 21 MODIFICATION

Any modification of this Lease must be in writing and signed by the parties. State shall not be bound by any oral representations or statements.

THIS AGREEMENT requires the signature of all parties and is executed as of the date of the last signature below.

(LESSEE NAME – ALL IN CAPS)

Dated: \_\_\_\_\_, 20\_\_\_\_

By: \_\_\_\_\_

Title:

Address:

STATE OF WASHINGTON  
DEPARTMENT OF NATURAL  
RESOURCES

Dated: \_\_\_\_\_, 20\_\_\_\_

By: \_\_\_\_\_

Title: (Typed Name Goes Here -  
Commissioner, Manager, etc)

Address:

Conservation Lease  
Approved as to Form September 2004  
By Alexandra K. Smith  
Assistant Attorney General  
State of Washington

CORPORATE ACKNOWLEDGMENT

STATE OF \_\_\_\_\_ )  
 ) ss  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me  
personally appeared

\_\_\_\_\_

to me known to be the

\_\_\_\_\_ of the  
corporation that executed the within and foregoing instrument, and  
acknowledged said instrument to be the free and voluntary act and deed of  
said corporation, for the uses and purposes therein mentioned, and on oath  
stated that (he/she was) (they were) authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my  
official seal the day and year first above written.

\_\_\_\_\_  
Notary Public in and for the State of  
\_\_\_\_\_ residing at  
\_\_\_\_\_.

My appointment expires

\_\_\_\_\_.

## STATE ACKNOWLEDGMENT

STATE OF WASHINGTON )  
 )ss  
County of )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_,  
personally appeared before me

to me known to be the \_\_\_\_\_ of the Department of Natural Resources, State of Washington, who executed the within and foregoing instrument on behalf of the State of Washington, and acknowledged said instrument to be the free and voluntary act and deed of the State of Washington for the uses and purposes therein mentioned, and on oath stated that [he/she] was authorized to execute said instrument and that the seal affixed is the official seal of the Commissioner of Public Lands for the State of Washington.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

Notary Public in and for the State of  
Washington, residing at

My appointment expires